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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEWAYNE RAMON THOMPSON,

Defendant and Appellant.

E029200

(Super.Ct.No. FSB025462)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Robert W. Fawke, Judge. Affirmed.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J.T. Carlton and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Dewayne Ramon Thompson of second degree robbery under Penal Code section 211¹ (count 1), first degree residential burglary under section 459 (count 2), first degree robbery under section 211 (count 3), and two counts of assault with a firearm under section 245, subdivision (a)(2) (counts 4 and 5). The jury also found true the allegations that (1) as to counts 1 and 3, defendant personally used a firearm under section 12022.53, subdivision (b); (2) as to count 1, defendant personally and intentionally discharged a firearm under section 12022.53, subdivision (c); and (3) as to counts 1, 2, 4 and 5, defendant personally used a firearm under section 12022.5, subdivision (a)(1). The trial court sentenced defendant to a total term of 34 years in state prison.

On appeal, defendant contends that: (1) the trial court denied defendant his right to present a defense and his right to effective assistance of counsel when it barred defendant's attorney from arguing that defendant's post-arrest statement was proof of an alibi; (2) the evidence was insufficient to support defendant's conviction on count 5 -- assault with a deadly weapon; (3) we must modify the judgment on counts 4 and 5 because the jury convicted defendant of assault with a deadly weapon, not assault with a firearm; (4) there was insufficient evidence to support the true finding that defendant's juvenile adjudication for attempted robbery constituted a serious felony; (5) the prosecutor committed prosecutorial misconduct when it elicited improper evidence; (6) the trial court erred in instructing the jury with CALJIC No. 2.71.6 (adoptive

¹ All statutory references are to the Penal Code unless otherwise specified.

admissions); and (7) the trial court erred in instructing the jury with CALJIC No. 17.41.1.

We find no merit to defendant's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

I. Prosecution Evidence

A. November 12, 1999 Robbery

On November 12, 1999, at approximately 5:30 p.m., Erlyn H. was sitting on the couch watching a video with her six-year-old daughter, R., when defendant entered their San Bernardino apartment.

Defendant told them not to scream or he would kill them. Defendant then demanded money and pulled a gun out of his pocket. While R. clung to Erlyn's leg, defendant pointed his gun at Erlyn's head and stated, "Give me all of your money. If you don't give me your money, I will kill you with your daughter." Erlyn handed defendant a purse without any money in it and tried to give him her watch and VCR. Erlyn then went to the closet and pretended to look for money. During this time, defendant continued to hold a gun to Erlyn's head. Thereafter, Erlyn and R. locked themselves in the bathroom at defendant's command. Defendant rummaged through the apartment for approximately 15 minutes. When Erlyn heard defendant leave the apartment, she left the bathroom, went to a neighbor's house, and called 911.

Erlyn identified defendant as the man who robbed her. She also identified the chain seized at defendant's home as the chain that the robber wore that evening.

B. January 30, 2000 or the “Del Taco” Robbery

On the afternoon of January 30, 2000, defendant went to a Del Taco restaurant and asked for a glass of water and the price of a taco. Approximately one and a half hours later, defendant returned to the restaurant wearing the same clothes and a ski mask. Defendant pointed a gun at the cashier’s head and demanded money. The cashier handed defendant approximately \$130. Defendant then fired two or three shots into the back of the store before leaving.

The cashier identified defendant as the person who robbed Del Taco. On cross-examination, the cashier said she recognized the robber as the person who had come in previously because he was wearing the same clothing.

C. Defendant’s Statements

On February 4, 2000, after defendant was arrested and read his *Miranda*² rights, he agreed to be interviewed by a detective. Defendant denied any involvement in the November 12, 1999 robbery. Defendant stated that he had been working at Hayley Brothers from 3:00 p.m. until 3:00 a.m. that day. Defendant also denied any involvement in the Del Taco robbery. Defendant claimed that he had been at his friend Sertgio Murrell’s house watching the Super Bowl from before the game started until 7:00 p.m., except for brief periods of time when he went to check on his girlfriend who was due to have a baby.

² *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

D. Rebuttal to Defendant's Alibis

At trial, the prosecution presented evidence that the only two days defendant had ever worked at Hayley Brothers were November 18 and 19 -- one week after the November 12 robbery. The prosecution also presented evidence that defendant did not go to his friend Murrell's house until half-time, that he left his house several times during the game, and that defendant's girlfriend was out shopping during the Super Bowl and did not see defendant until 10:00 p.m. that night.

II. Defense Evidence

A detective testified that two witnesses who were interviewed regarding the Del Taco robbery described the colors of the stripes on the robber's shirt differently than the Del Taco cashier.

ANALYSIS

I. Defendant Was Not Denied His Right to Present a Defense

or to Effective Assistance of Counsel

Defendant contends that the trial court deprived him of his constitutional right to present a defense and to the effective assistance of counsel when the trial court barred defendant from arguing that his post-arrest statement was proof of an alibi.

A. Background

The prosecution made clear before trial that it planned to introduce defendant's post-arrest alibi statements to the police only to show consciousness of guilt.

At trial, the detective testified that defendant stated that he had been working at Hayley Brothers on the night of the November 12 robbery. The prosecution then presented evidence that the only two days defendant had ever worked at Hayley Brothers were on November 18 and 19 -- one week after the robbery.

The detective also testified that when defendant was asked where he was between 3:00 and 7:00 on the evening of the Del Taco robbery, defendant stated that he had been at his friend's house watching the Super Bowl from before the game started until after 7:00 p.m., except for brief periods of time when he went to check on his girlfriend. The prosecution, however, presented evidence that defendant did not arrive at his friend's house until half-time, that he left several times during the game, and that defendant's girlfriend was not home during the Super Bowl and did not see defendant until 10:00 p.m. that night.

Prior to closing arguments, the prosecution asked for a ruling from the trial court that defense counsel could not argue that his statements to the police were evidence of alibis for the robberies because those statements were only admitted to show consciousness of guilt. The trial court agreed and ruled that the statements were not evidence of an alibi and the defense could not make that argument. The defense, however, was not precluded from arguing that other witness' testimony was evidence of an alibi or that defendant's police statements did not show a consciousness of guilt.

B. The Trial Court Properly Admitted Defendant's Statements Only as Evidence of Defendant's Consciousness of Guilt

Hearsay "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."³

Hearsay evidence is inadmissible except as provided by law.⁴ However, "[o]ut-of-court statements not offered to prove the truth of the matter stated are not regarded as hearsay."⁵

In this case, defendant's statements regarding his whereabouts on the nights of the robberies were made to the police, out of court. Thus, these statements were inadmissible hearsay evidence unless they were offered to prove something other than the truth of the matter stated, or unless the evidence fell within an exception to the hearsay rule. Here, the statements were offered by the prosecution to show consciousness of guilt, not to prove the truth of the matter stated. "A prior statement, although exculpatory in form, may prove highly incriminating at the trial because, upon a showing of its falsity, it can constitute evidence of consciousness of guilt."⁶

Defendant contends that the evidence is not hearsay because it was offered by the prosecution -- a party opponent.⁷ In this case, however, the prosecution did not offer the

³ Evidence Code section 1200, subdivision (a).

⁴ Evidence Code, section 1200, subdivision (b).

⁵ *People v. Jaspal* (1991) 234 Cal.App.3d 1446, 1462.

⁶ *People v. Underwood* (1964) 61 Cal.2d 113, 121; see also *People v. Mendoza* (1987) 192 Cal.App.3d 667, 672-673.

⁷ Evidence Code section 1220.

statements as admissions. Instead, the prosecution offered the evidence solely as evidence of defendant's consciousness of guilt.

Therefore, with this limitation, it was proper for the trial court to admit the statements as evidence of defendant's consciousness of guilt -- not for the truth of the matter asserted. (Any use of the statements for the truth of the matter asserted, however, would have brought the statements into the prohibition of the hearsay rule.)

C. Defendant Was Not Deprived of His Right to Present a Defense When the Trial Court Limited His Argument to Theories Supported by the Evidence

A defendant has a fundamental right under the United States Constitution to present a defense and all pertinent evidence significant to that defense.⁸ Accordingly, a defendant has a constitutional right to have his counsel present a closing argument to the jury.⁹ The trial court, however, has broad discretion in limiting the scope of counsel's argument to ensure that it "does not stray unduly from the mark."¹⁰ And, it "is axiomatic that counsel may not state or assume facts in argument that are not in evidence."¹¹

Defendant contends that he was denied his right to present a defense because the trial court prevented him from arguing his theory of defense -- that he had alibis for the robberies -- to the jury. Defendant is mistaken. Defendant was free to present alibi

⁸ *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099, citing *Davis v. Alaska* (1974) 415 U.S. 308, 317 [94 S.Ct. 1105, 39 L.Ed.2d 347].

⁹ *People v. Marshall* (1996) 13 Cal.4th 799, 854; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.

¹⁰ *People v. Marshall*, *supra*, 13 Cal.4th 799, 854-855; *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, 1184.

evidence to the jury, and he was also free to argue an alibi defense to the jury as long as it was based on evidence presented at trial. The *only* limitation the trial court placed on defendant's closing argument was that he could not argue anything on the basis of inadmissible hearsay evidence. This ruling was proper because, as discussed above, defendant's statements to the police were not admitted for their truth, but for the limited purpose of showing consciousness of guilt. Thus, the statements did not constitute evidence of an alibi to either robbery. Therefore, the trial court's ruling did not deny defendant the right to present a defense. Rather, it was a proper exercise of the court's responsibility to limit argument to theories supported by the evidence.

D. Defendant Was Not Denied the Effective Assistance of Counsel

Defendant contends that the trial court denied him the effective assistance of counsel in prohibiting his attorney from arguing his police statements supported an alibi defense to the robberies.

Defendant's ineffective assistance of counsel argument is without merit. If a trial court rules against defense counsel, and that ruling is erroneous, the error should be characterized as denial of the right to a fair trial or to due process, not ineffective assistance of counsel.¹²

Here, there is no evidence that defendant was denied his right to a fair trial or to due process. As discussed above, the trial court properly limited the scope of defense

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¹¹ *People v. Stankewitz* (1990) 51 Cal.3d 72, 102.

counsel's closing argument. Hence, we cannot find any violation of defendant's right to a fair trial or to due process as a result of the trial court's ruling on defendant's statements to the police.

II. Defendant's Conviction for Assault With a Deadly Weapon on R. H.

Defendant contends that there was insufficient evidence to support his conviction on count 5 -- assault with a firearm on R.

A. Standard of Review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]"¹³

B. Substantial Evidence Supports Defendant's Conviction

The crime of assault requires an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.¹⁴ Assault with a deadly weapon is a general intent crime.¹⁵ "The mens rea is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another,

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¹² See *People v. Sixto* (1993) 17 Cal.App.4th 374, 381.

¹³ *People v. Bolin* (1998) 18 Cal.4th 297, 331.

¹⁴ Section 240.

i.e., a battery.”¹⁶ While “the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm.”¹⁷

To commit an assault with a firearm, it is not necessary to point the gun directly at the victim.¹⁸ Hence, the Supreme Court has recognized that a jury would be warranted in finding an assault where the defendant does not directly point the weapon at the victim “but holds it in such a position as enables him to use it before the other party could defend himself, at the same time declaring his determination to use it against the other”¹⁹

Contrary to defendant’s argument, the evidence showed that R. was more than just “present” during an assault on her mother. The evidence showed that the six-year-old daughter was clinging to her mother, Erlyn H., when defendant pointed a gun at the mother’s head and stated, “Give me all of your money. If you don’t give me your money, I will kill you *with your daughter*.” (Italics added.) The evidence also showed that when Erlyn went to the closet to look for money, R. was holding onto her on one side while defendant was on her other side holding a gun to her head. Hence, the evidence clearly showed that defendant held a gun in a position that he could easily have

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¹⁵ *People v. Colantuono* (1994) 7 Cal.4th 206, 214.

¹⁶ *People v. Colantuono, supra*, 7 Cal.4th 206, 214.

¹⁷ *People v. Colantuono, supra*, 7 Cal.4th 206, 214.

¹⁸ *People v. Raviart* (2001) 93 Cal.App.4th 258, 263.

¹⁹ *People v. McMakin* (1857) 8 Cal. 547, 549.

used it against R. before she could defend herself, while threatening to kill her.

Moreover, if defendant had fired the gun at the mother while R. was holding onto her, it was certainly foreseeable that R. could have been wounded.

Therefore, we hold that there was substantial evidence to support defendant's conviction for assault with a firearm on R. H..

III. The Jury Convicted Defendant of Assault With a Firearm

Defendant contends that we must modify the judgment as to counts 4 and 5 because the jury verdict forms indicate that the jury convicted defendant of assault with a deadly weapon while the abstract of judgment indicates that defendant was convicted of assault with a firearm.

A. Background

Defendant was charged with two counts of assault with a firearm under section 245, subdivision (a)(2). The jury was instructed on the elements of assault with a firearm. The jury, however, was given instructions that the charge was assault with a deadly weapon under section 245, subdivision (a)(1). Thereafter, the jury was given verdict forms for assault with a deadly weapon, not with a firearm. The jury then returned verdicts convicting defendant of assault with a deadly weapon. The abstract and judgment, however, show that defendant was convicted of two counts of section 245, subdivision (a)(2) -- assault with a firearm.

Defendant contends that because the jury returned verdicts under section 245, subdivision (a)(1), not subdivision (a)(2), the judgment should be modified to reflect the same.

B. Defendant Was Convicted Under Section 245, Subdivision (a)(2)

A verdict is to be construed in light of the charging instrument, the plea entered by the defendant, the issues submitted to the jury, and the court's instructions to the jury.²⁰ The form of the verdict is immaterial as long as the jury's intention to convict of the crime charged in the information is unmistakably expressed.²¹

In this case, a review of the record shows that the jury unmistakably intended to find defendant guilty of assault with a firearm in counts 4 and 5. The information charged defendant in counts 4 and 5 with assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2). The signed verdict form for count 4 stated:

"We the jury in the above entitled action, find the defendant . . . guilty of the crime of ASSAULT WITH A DEADLY WEAPON on Erlyn H. *as charged in Count 4.*"
(Italics and bold print added.)

Moreover, the signed verdict for count 5 stated:

"We the jury in the above entitled action, find the defendant . . . guilty of the crime of ASSAULT WITH A DEADLY WEAPON on [R.] H. *as charged in Count 5.*"
(Italics and bold print added.)

²⁰ *People v. Paul* (1998) 18 Cal.4th 698, 706-707; *People v. Jones* (1997) 58 Cal.App.4th 693, 710.

The jury also found true the allegations that defendant personally *used a firearm* in the commission of the offenses charged in counts 4 and 5. Moreover, during trial, it was undisputed that the deadly weapon used during the assaults on Erlyn and R. H. was a firearm. Finally, while the court called the crime charged in counts 4 and 5 “Assault with a Deadly Weapon” in one instruction, the court went on to instruct the jury on the elements of the crime of assault with a *firearm*, in violation of section 245, subdivision (a)(2).

Therefore, the information gave adequate notice that the crime charged in counts 4 and 5 was assault with a firearm. The verdict forms referred to the charge in the information. The exact meaning of the charge named in counts 4 and 5 of the information was defined by the court through its description of the elements of the offense of assault with a firearm. The uncontradicted evidence was that the deadly weapon used in the assaults was a firearm, and the jury found true the allegations that defendant personally used a firearm during the commission of the assaults. Thus, the jury’s verdicts unmistakably indicated an intention to find defendant guilty of assault with a firearm. Therefore, we have no reason to modify the judgment for counts 4 and 5.

IV. The Issue Regarding Defendant’s Prior Juvenile Conviction Is Moot

Defendant contends that there was insufficient evidence that his juvenile adjudication for attempted robbery constituted a “strike” prior. This issue, however, is moot -- the trial court dismissed the strike allegation because the prosecution violated

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²¹ *People v. Paul*, *supra*, 18 Cal.4th 698, 707.

*People v. Tindall*²² in filing the strike allegation after the jury was dismissed. We need not address this issue because appellate courts do not review questions that are moot and only of academic importance.²³

V. There Was No Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct when he asked a witness, Sertgio Murrell, about “kites” in prison, allegedly without a good faith belief that any “kites” had been sent in this case.

A. Background

During Murrell’s testimony, the prosecutor asked him if he had talked to anyone about his proposed testimony. Murrell stated that he did not because he was in custody. The prosecutor then elicited from Murrell that it is possible to send informal mail between inmates in jail through a system called “kites.” Defense counsel objected to the testimony about the kites, asked that it be stricken, and moved for a mistrial. The prosecutor conceded that he had no evidence that a kite had been sent, but claimed that the purpose of eliciting the questions about the kites was to impeach Murrell’s testimony that he did not speak to anyone about his testimony because he did not have access to a telephone. The trial court overruled the objection and denied the motion for mistrial.

²² *People v. Tindall* (2000) 24 Cal.4th 767.

²³ *People v. Hamilton* (1968) 258 Cal.App.2d 511, 516.

B. The Prosecutor Properly Questioned Murrell

A prosecutor commits misconduct, under the federal constitutional standard, when he engages in a pattern of conduct that is so egregious that it deprives the defendant of a fair trial.²⁴ Under the state standard, a prosecutor's behavior amounts to misconduct when he applies deceptive or reprehensible methods to sway the court or the jury.²⁵

Under Evidence Code section 780, a "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing" This includes the existence or nonexistence of any fact testified to by the witness.²⁶

In this case, the prosecutor properly asked Murrell about the kite system in jails to impeach his testimony that he could not communicate with anyone about the trial simply because he was in jail. When defendant was interviewed by a detective during the investigation of this case, defendant stated that he was at Murrell's house watching the Super Bowl at the time of the Del Taco robbery, but that he had left several times to check on his pregnant girlfriend. At trial, Murrell testified, consistent with defendant's statement to the police, that the second time defendant left his house, defendant stated that he was going to check on his pregnant girlfriend. The prosecutor then questioned Murrell as to why he had not shared this information with the police during his interview, and why he was suddenly offering this information at trial. Thereafter, the prosecutor

²⁴ *People v. Smithey* (1999) 20 Cal.4th 936, 960.

²⁵ *People v. Smithey, supra*, 20 Cal.4th 936, 960.

asked whether Murrell had spoken with anyone about his testimony. When Murrell testified that the prosecutor was the only person he had spoken with about the trial, and that he did not speak with anybody else about the case, the following colloquy occurred:

“Q: No one?

“A: No. *Because where I am at, I can’t get no visits or use the phone.*

“Q. You can’t get mail?

“A. Yes, I get mail from Diana Davis.

“Q. Isn’t there a system in the jail that has kind of their own post office besides the official mail?

“A. Yes, I get letters from Diana Davis.

“Q: That is your girlfriend, right?

“A: Yes.

“Q: Now, isn’t there a system besides that?

“A: A system besides that?

“Q: Yeah. Have you ever heard the term kite?

“A: Yes

“.....

“Q: People come in to and from court, they pass each other kites, give this to so and so?

“A: No, I have not received nothing like that.

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²⁶ Evidence Code, section 780, subdivision (k).

“Q: It does exist, though, doesn’t it?

“A: Yes.

“Q: So the fact that you can’t get to a telephone--” (Italics added.)

At this point, defense counsel objected to this line of questioning as irrelevant and asked that the testimony relating to kites be stricken, and the jury be directed to disregard it. The court overruled the objection.

The prosecutor continued, and asked: “So the fact that you can’t get to a telephone doesn’t mean you can’t get communication, isn’t that true?” Murrell responded that he was locked down 24 hours a day. The prosecutor then asked whether that meant that Murrell could not receive kites. After an objection and request for mistrial, the trial court overruled the objection and held that the prosecutor could clarify that there was a method of communication available to Murrell in jail.

We agree with the trial court’s ruling. The prosecutor could properly question Murrell regarding kites in order to impeach his testimony that he could not have communicated with anyone about the case because he was in jail. Hence, we fail to see any prosecutorial misconduct.

VI. The Trial Court Properly Instructed the Jury With

CALJIC No. 2.71.5 on Adoptive Admissions

Defendant contends that the trial court violated his constitutional right to remain silent when it instructed the jury with CALJIC No. 2.71.5 on adoptive admissions.

However, under the doctrine of invited error, a defendant may not complain of an erroneous instruction given at his own request.²⁷

In this case, defense counsel initially objected to the giving of CALJIC No. 2.71.5. Defense counsel stated that “[t]here was an objection to 2.71.5.” Immediately thereafter, defense counsel stated that he was requesting a different jury instruction, CALJIC No. 2.71. In response, the People objected to CALJIC No. 2.71. Thereafter, the following colloquy transpired:

“[PROSECUTOR]: You want 2.71. If they are going to get 2.71, they need to get 2.71.5.

“[DEFENSE COUNSEL]: Okay.

“THE COURT: So they are going to get them both, is that correct? You *want* .71 or .71.5 would appear to be applicable. (Italics added.)

“[DEFENSE COUNSEL]: All right.”

The evidence shows that defendant invited any error by requesting the now-challenged instruction.²⁸ We recognize that the invited error doctrine applies only where defense counsel ““acted for tactical reasons and not out of ignorance or mistake.””

²⁷ *People v. Macias* (1997) 16 Cal.4th 739, 746, footnote 3; *People v. Carpenter* (1997) 15 Cal.4th 312, 420.

²⁸ *People v. Ochoa* (1998) 19 Cal.4th 353, 457-458, cert. den. (1999) 528 U.S. 862 [120 S.Ct. 152, 145 L.Ed.2d 130]; *People v. Medina* (1995) 11 Cal.4th 694, 763, cert. den. (1996) 519 U.S. 854 [117 S.Ct. 151, 136 L.Ed.2d 96].

[Citation.]”²⁹ But this does not mean defense counsel must state tactical reasons on the record, nor does it mean the tactical reasons must be sound. “[T]he record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. . . . A claim that the tactical choice was uninformed or otherwise incompetent must, like any such claim, be treated as one of ineffective assistance of counsel.”³⁰ Here, the evidence showed that defense counsel initially objected to instructing the jury with CALJIC No. 2.71.5. Defense counsel, however, chose to acquiesce to the giving of the instruction because he wanted the jury instructed with CALJIC No. 2.71. Hence, defense counsel amply demonstrated that he knew he had the choice between having the instruction and not having it. It was a tactical decision to agree to instructing the jury with CALJIC No. 2.71.5. Accordingly, the invited error doctrine applies.

²⁹ *People v. Bradford* (1997) 14 Cal.4th 1005, 1057, cert. den. 522 U.S. 953 [118 S.Ct. 377, 139 L.Ed.2d 293], quoting *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 330, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.

³⁰ *People v. Cooper* (1991) 53 Cal.3d 771, 831, cert. den. 502 U.S. 1016 [112 S.Ct. 664, 116 L.Ed.2d 755].

VII. The Trial Court Properly Instructed the Jury With CALJIC No. 17.41.1

Defendant contends that the trial court erred in instructing the jury with CALJIC No. 17.41.1³¹ because it violates his right to a fair trial, it threatens the privacy and impartiality of jury deliberations, it impinges on his right to a unanimous verdict, it has a chilling effect on the jurors, and it is essentially an anti-nullification instruction which violates his right to an impartial jury.

Substantially similar and related arguments were rejected by the California Supreme Court in *People v. Engelman*.³² Accordingly, we reject defendant's constitutional challenge. We observe, however, that the *Engelman* court exercised its supervisory powers and directed that the instruction not be given in future trials.³³ The *Engelman* court reasoned that the instruction creates an inadvisable and unnecessary risk of intrusion upon the secrecy of deliberations or of an adverse impact on the course of deliberations.³⁴ But here, as in *Engelman*, there is no indication that the instruction affected the jurors' deliberations in any way. Thus, defendant has not shown that the instruction violated his constitutional rights in any respect.

³¹ CALJIC No. 17.41.1, as given to the jury in the instant case, states as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

³² *People v. Engelman* (2002) 28 Cal.4th 436.

³³ *People v. Engelman*, *supra*, 28 Cal.4th 436, 449.

³⁴ *People v. Engelman*, *supra*, 28 Cal.4th 436, 446-449.

DISPOSITION

The judgment is affirmed.

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/s/ Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ Gaut
J.